IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

476 K, LLC,	:	
	:	
Plaintiff,	:	
	:	Case No. 398572-V
v.	:	
	:	
ERIE INSURANCE EXCHANGE,	:	
	:	
Defendant.	:	

MEMORANDUM AND ORDER

Pending before the court is the defendant's motion to dismiss the plaintiff's complaint. The plaintiff filed a written opposition, and the defendant filed a reply. The court held a hearing on April 16, 2015. For the reasons discussed below, the motion to dismiss will be denied.

Factual Background

The plaintiff in this case is 476 K, a limited liability company organized under the law of the District of Columbia with its principal place of business in Washington, D.C. The members of 476 K, LLC are Andre de Moya, Tony Cavasilios, Brooke Patterson and 5K Properties, LLC. The plaintiff is a tenant in a property located at 476 K Street, NW, Washington DC 20001, which is composed of three connected buildings. The plaintiff owns and operates a club at the property and leases this space from 9th St. Restaurants, Inc. (the "landlord").

The defendant is Erie Insurance Exchange ("Erie"), a Pennsylvania company that has its principal place of business in Pennsylvania. Erie is authorized to conduct business in the State of Maryland. The plaintiff purchased a $5.5 million commercial property insurance policy from Erie. This policy provided coverage from June 28, 2013 to June 28, 2014.

The complaint alleges that on May 2, 2014, due to defective construction methods, part of the property abruptly collapsed resulting in severe damage and leaving the remainder of the

property unsafe for occupancy. Although the plaintiff alleges that it insured the entire property for this kind of loss, Erie's position is that the policy only covered loss of "machinery" as specified in Section 7.01 of the lease agreement (the "lease") between the landlord and the plaintiff. This disagreement led the plaintiff to file this action for declaratory judgment (count I), breach of an insurance contract (count II), and breach of the implied covenant of good faith and fair dealing (count III).

Insurance Policies

Under Section 9.01 of the lease, the landlord was required to maintain property insurance on the building. Correspondingly, the landlord obtained a $1.1 million insurance policy from Western Heritage. Under the first amendment to the lease, ¶ 15, effective June 1, 2013, the plaintiff was required to reimburse the landlord for 100% of the landlord's insurance costs.

The plaintiff alleges that it was concerned that the Western Heritage policy was insufficient to adequately protect its interest in the property. Therefore, the plaintiff obtained a $5.5 million insurance policy from Erie. The Erie policy insured the property against all risks of direct physical loss including collapse from defective construction methods. The policy provided, in pertinent part:

> "We will pay for direct physical loss or damage to Covered Property, caused by abrupt collapse of a building or any part of a building that is insured under this Coverage Form or that contains Covered Property insured under this Coverage Form, if such collapse is caused by one or more of the following:
> . . .
>
> c. Use of defective material or methods in construction, remodeling or renovation if the abrupt collapse occurs during the course of the construction, remodeling or renovation."

See Policy, Causes of Loss – Special Form, § D Additional Coverage – Collapse, ¶ 2.

The plaintiff alleges that it provided Erie with timely notice of the collapse and requested coverage under the policy. Erie responded with a formal coverage position on September 30,

2014, more than 21 weeks after the collapse. Erie stated that because the lease only required the plaintiff to obtain machinery insurance, the plaintiff's insurable interest was limited to machinery.

Legal Standard

In ruling on a motion to dismiss under Md. Rule 2-322(b), "a circuit court assumes the truth of the complaint's factual allegations, and any reasonable inferences, in the light most favorable to the plaintiff." *Patton v. Wells Fargo Fin. Md., Inc.*, 437 Md. 83, 95 (2014). The court's review at this juncture is cabined to the pertinent pleading and any documents attached to or incorporated into that pleading by reference. *Smith v. Danielczyk*, 400 Md. 98, 103-04 (2007). The court's objective at this point simply is to see whether relief can or cannot be granted on the basis of the facts alleged in the complaint as a matter of law. *Kendall v. Howard Cnty.*, 204 Md. App. 440, 446-47 (2012); *Converge Servs. Grp., LLC v. Curran*, 383 Md. 462, 475 (2004).

However, boilerplate or conclusory statements do not receive the benefit of this forgiving standard. *RRC Northeast, LLC, v. BAA Md., Inc.*, 413 Md. 638, 643-44 (2010). "[A]ny ambiguity or uncertainty in the allegations bearing on whether the complaint states a cause of action must be construed against the pleader." *Ronald M. Sharrow, Chartered v. State Farm Mut. Auto. Ins. Co.*, 306 Md. 754, 768 (1986); *cf. Berman v. Karvounis*, 308 Md. 259, 265 (1987) ("what we consider are allegations of fact and inferences deducible from them, not merely conclusory charges."). In Maryland, a claimant must allege sufficient facts to constitute a cause of action. *Ver Brycke v. Ver Brycke*, 379 Md. 669, 696-97 (2004). Consequently, "a pleading that fails to allege facts, or that fails to demand a particular form of relief, fails to fulfill the purposes of pleading." PAUL V. NIEMEYER, LINDA M. SCHUETT & JOYCE E. SMITHEY, MARYLAND RULES COMMENTARY 238 (4th ed. 2014).

Discussion

At the outset, the court must decide whether Maryland law or the law of the District of Columbia applies. Erie contends that the law of the District of Columbia applies because this is where the property is located, and because the Erie insurance policy includes a District of Columbia cancellation and nonrenewal endorsement.

In response, the plaintiff argues that in the absence of a choice of law provision, Maryland law applies. In support of this position, the plaintiff contends that the Erie insurance policy was made and delivered in Maryland, Erie's agent was located in Maryland, and the premiums were paid from Maryland. Further, the plaintiff argues that the single District of Columbia cancellation and nonrenewal endorsement was included because the property is located in the District of Columbia, but it does not imply a choice of District of Columbia law for interpreting the policy.

Insurance policies are contracts and are treated and construed like other contracts. *TIG Ins. Co. v. Monongahela Power Co.*, 209 Md. App. 146, 161 (2012). Both Erie and the plaintiff agree that absent a choice of law provision in a contract, Maryland courts apply the rule of *lex loci contractus*, which provides that the law of the jurisdiction where the contract was made governs the construction, validity, enforceability or interpretation of a contract. *Cunningham v. Feinberg*, 441 Md. 310, 325 (2015). For choice of law purposes, a contract is made where the last act necessary to make the contract binding occurs. *Konover Prop. Trust, Inc. v. WHE Assocs, Inc.*, 142 Md. App. 476, 490 (2002). Maryland appellate courts have held that the *locus contractu* of an insurance policy is the state in which the policy is delivered and the premiums are paid. *See, e.g., TIG Ins. Co.*, 209 Md. App. at 162; *U.S. Life Ins. Co. in City of New York v.*

Wilson, 198 Md. App. 452, 463 (2011); *Continental Cas. Co. v. Kemper Ins. Co.*, 173 Md. App. 542, 548 (2007).

In this case, after reviewing the Erie policy attached to the complaint, the court concludes that Maryland law applies. While the Erie policy did not have a choice of law provision, the policy was made and delivered in Maryland. Erie's agent is located in Maryland. Erie has not cited any authority to support the proposition that the property's location in the District of Columbia, without more, requires application of District of Columbia law to interpret the terms of the policy. Instead, Erie cites three cases from foreign jurisdictions that this court finds unpersuasive.

Erie's reliance on *Assicurazioni Generali, S.P.A. v. Clover*, 195 F.3d 161 (3d Cir. 1999) and *Blizzard v. Federal Ins. Co*, No. 05-5283, 2007 WL 675346 (E.D. Pa. Feb. 27, 2007) is inapposite. In *Clover*, the insured, who suffered an accident in Pennsylvania, relied on the policy's endorsement, titled "Indiana Changes," to claim entitlement to certain benefits. *Assicurazioni Generali, S.P.A. v. Clover*, 195 F.3d 161, 163 (3d Cir. 1999). The court held that although the insurance policy and the endorsement did not contain explicit choice of law provisions, Indiana law applied. *Id.* at 164-65. The court based this decision on the repeated references to Indiana law in the endorsement, the fact that the policy was drafted in accordance with Indiana law, and the fact that the policy included the endorsement required by the state of Indiana. *Id.*

In *Blizzard v. Federal Ins. Co*, No. 05-5283, 2007 WL 675346 (E.D. Pa. Feb. 27, 2007), the insured suffered an accident in Pennsylvania and sought to recover benefits under his employer's insurance policy. The court determined that although there was no choice of law provision, New Jersey law applied because the endorsement containing the policy provisions

relevant to the case were titled "New Jersey Uninsured and Undersigned Motorists Coverage," and the endorsement was written to comply with New Jersey law. *Blizzard v. Federal Ins. Co*, No. 05-5283, 2007 WL 675346, at *3 (E.D. Pa. Feb. 27, 2007).

The court finds that Erie's reliance on *Clover* and *Blizzard* is unpersuasive. Unlike in those cases, the plaintiff in this case is not claiming coverage under the District of Columbia endorsement, which applies only to nonrenewal and cancellation terms. Rather, the plaintiff is claiming coverage under the general terms of the policy.

Similarly, Erie's reliance on *Bell v. USAA Casualty Ins. Co.*, 52 V.I. 771, 2009 WL 2524351 (D.V.I. 2009) also is unpersuasive. In that case, after suffering an accident in the U.S. Virgin Islands, the insured filed a lawsuit against his insurance company seeking more coverage than the $10,000 coverage already provided. The insurance policy did not explicitly mandate the application of any state's law. *Bell v. USAA Casualty Ins. Co.*, No. 2008–100, 2009 WL 2524351, at *3 (D.V.I. Aug. 14, 2009). The court nonetheless held that Massachusetts law applied because the policy was called "Massachusetts Automobile Insurance Policy," the policy stipulated that it was "a legal contract under Massachusetts law," and "it brimmed with references to the laws of Massachusetts." *Id.* Unlike in *Bell*, the Erie policy does not stipulate that it is a legal contract under the law of the District of Columbia or "brim[s] with references" to the law of the District of Columbia. For all these reasons, the court concludes that Maryland law is appropriate to interpret the terms of the insurance policy.

Insurable Interest

Erie argues that the plaintiff, as a tenant, cannot recover more that its limited insurable interest in the building. Under the lease, the plaintiff was required to obtain coverage for certain systems ("machinery insurance") and this is what Erie insured when the plaintiff purchased the

$5.5 million insurance policy. Erie contends that since the lease required the landlord to obtain property insurance on the building, the plaintiff could not have obtained similar coverage because that was not its obligation under the lease.

The plaintiff opposes Erie's argument by indicating that under Section 15 of the First Amendment to the Lease, the plaintiff was required to reimburse the landlord for 100% of the landlord's insurance costs to insure the building. According to the plaintiff, this meant that its insurance obligations under the lease were not limited to machinery insurance. The landlord obtained a $1.1 million policy from Western Heritage. The plaintiff alleges that because the $1.1 million policy was insufficient to cover the full value of the property and its interests, the plaintiff obtained a $5.5 million policy from Erie to cover the entire property and named the landlord as the first mortgagee on the property. The plaintiff argues that the two interests it was protecting with the Erie policy were: (1) its option to purchase the building for $5.5 million, and (2) its nude dancing license to operate a gentleman's club in the building.

Under the facts pled and the reasonable inferences that can be derived from those facts, a jury could conclude that the plaintiff had an insurable interest in the entire building. Under Maryland law, an insurable interest is an "actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance against loss, destruction, or pecuniary damage or impairment to the property." Md. Code Ann., Ins. § 12-301(a). A property insurance contract "is enforceable only for the benefit of a person with an insurable interest in the property at the time of the loss." Md. Code Ann., Ins. § 12-301(b). An insurable interest is measured is measured "by the extent of possible harm to the insured from loss, injury, or impairment of the property." Md. Code Ann., Ins. § 12-301(c).[1] In Maryland, an insurable interest is a broad

[1] Erie admitted in its motion and at the hearing that Maryland law is consistent with the law of the District of Columbia regarding the definition of "insurable interest." *See* Erie's motion to dismiss at page 6, footnote 3.

concept, not limited by ownership or possessory rights and it is a concept that favors insurance coverage. *Selective Way Ins. Co. v. National Fire Ins. Co. of Hartford*, 988 F.Supp.2d 530, 534, 537 (D. Md. 2013).[2]

The plaintiff's alleged purchase option of the building cannot be a basis for an insurable interest because the plaintiff assigned this purchase option to 5K Properties, LLC before the Erie policy became effective. The court also cannot consider the entertainment license as a basis for the plaintiff's insurable interest because this license was not included in the complaint's factual allegations and attached exhibits. However, a jury could find that when the plaintiff obtained the Erie policy for $5.5 million, the plaintiff sought to insure the entire building. While the lease obligated the plaintiff to obtain machinery insurance, the lease did not prohibit the plaintiff from obtaining insurance covering more than the machinery. A jury could also find that the lease amendment requiring the plaintiff to reimburse the landlord for 100 % of its insurance costs also gave the plaintiff an insurable interest in the entire building. This provision of the amendment to the lease essentially made the plaintiff responsible for all insurance covering the property.

If the court were to treat this motion as a motion for summary judgment, it could not determine at this time, whether the plaintiff has an insurable interest, because this is likely a question of fact in this case. Whether having an insurable interest appears to be a question of fact or law is an issue of first impression in Maryland. Nonetheless, this court is persuaded that it is a question of fact as held by federal and state courts from other jurisdictions. *See, e.g.*, *New Hampshire Ins. Co. v. Blackjack Cove, LLC*, No. 3:10–cv–607, 2014 WL 1270984, at *8-9 (D. M.D. Tenn. March 26, 2014) (court denied defendant's motion for summary judgment because whether the defendant had an insurable interest in the property was a question of fact) (citing

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[2] As noted by Erie, even under the law of the District of Columbia, ownership of the property is not necessary to have an insurable interest. *Technical Land, Inc. v. Firemen's Ins. Co.*, 756 A.2d 439, 445 (D.C. 1999).

Kopetovske v. Mutual Life Ins. Co. of New York, 187 F. 499, 505-07 (6th Cir. 1911)); *Technical Land, Inc. v. Firemen's Ins. Co.*, 756 A.2d 439, 443 (D.C. 1999) (case was remanded for the trial court's consideration of the facts and in particular whether Technical Land had an insurable interest); *Ligon v. Peerless Ins. Co.*, No. CV 93-0346485 S, 1995 WL 356659, at *3 (Conn. Super. Ct. June 8, 1995) (the court denied the defendant's motion for summary judgment because there was a material question of fact as to whether the plaintiff had an insurable interest in the two cars that were the subject of the insurance policy); *Anderson v. State Farm Fire and Cas. Co.*, 397 N.W.2d 416, 417 (Minn. Ct. App. 1986) (after noting that having an insurable interest is a question of fact, the court found that the trial court's finding that the plaintiff had an insurable interest was clearly erroneous); *Hane v. Hallock Farmers Mut. Ins. Co.*, 258 N.W.2d 779, 781 (Minn. 1977). *But see Stover v. Secura Ins. Co.*, No. 252613, 252625, 2005 WL 1367103, at *2 (Mich. Ct. App. June 9, 2005) ("Whether a party has an insurable interest is a question of law for the court to decide."); *Jones v. Texas Pacific Indem. Co.*, 853 S.W.2d 791, 794 (Tex. App. 1993) ("Whether the parties had an insurable interest in the property is a question of law, not fact.").

Count I: Declaratory Judgment

Count I, which seeks a declaratory judgment under Md. Code Ann., Cts. & Jud. Proc. § 3-401, is not duplicative of count II, which seeks relief for breach of contract. Erie contends that count I should be dismissed because count I and count II involve the same question of contract interpretation. In response, the plaintiff argues that count I should not be dismissed because count I and count II seek different relief and therefore, are not redundant.

The court has determined that dismissal of count I is inappropriate. A declaratory judgment action seeks the court's declarations of the rights and obligations of the parties. *See*

Md. Code Ann., Cts. & Jud. Proc. § 3-401; *Broadwater v. State*, 303 Md. 461, 467 (1985). The grant of a motion to dismiss is rarely appropriate in a declaratory judgment action. *See, e.g.*, *Reiner v. Ehrlich*, 212 Md. App. 142, 152 (2013) (citing *Broadwater v. State*, 303 Md. 461 (1985)). However, a motion to dismiss is appropriate to challenge the legal availability or appropriateness of the declaratory judgment remedy. *Id.* In other words, where there is no justiciable controversy between the parties, a motion to dismiss a declaratory judgment is appropriate. *120 West Fayette Street, LLLP v. Mayor & City Council of Baltimore City*, 413 Md. 309, 356 (2010). "A controversy is justiciable when there are interested parties asserting adverse claims upon a state of facts" and a legal decision is "sought or demanded." *Id.* "To be justiciable the issue must present more than a mere difference of opinion, and there must be more than a mere prayer for declaratory relief." *Id.* In determining whether there is a justiciable controversy, there must be "specific factual allegations which, under all the circumstances, show that there is a substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Green v. Nassif*, 426 Md. 258, 292 (2012).

The situations where a court may dismiss a declaratory judgment action are limited. *Respess v. City of Frederick*, 82 Md. App. 253, 259 (1990). For example, a declaratory judgment action is not available where the questions have become moot, where the case lacked the necessary parties, where it requests adjudication based on facts that have yet to occur or develop, or where a declaration would neither serve a useful purpose nor terminate a controversy. *120 West Fayette Street, LLLP v. Mayor & City Council of Baltimore City*, 413 Md. 309, 356 (2010); *Popham v. State Farm Mut. Ins. Co.*, 333 Md. 136, 140, n. 2 (1993).

There is a justiciable controversy between Erie and the plaintiff. The parties are asserting adverse claims that need to be decided. On the one hand, Erie asserts that the plaintiff does not

have an insurable interest in the entire building and that therefore, it cannot be indemnified for damages covering the entire property. On the other hand, the plaintiff asserts that neither its status as a tenant nor the lease limit its insurable interest in the building, and that it is entitled to indemnification for damages to the entire property. This controversy is one that is of sufficient immediacy and warrants a declaratory judgment. While count I seeks a declaration of the parties' obligations, count II, relying on the declarations in count I, proceeds to ask the court for damages for Erie's alleged failure to indemnify the plaintiff. For these reasons, count I is not duplicative of count II and should not be dismissed.

Count II: Breach of Contract (Indemnity)

Count II will not be dismissed because the complaint has alleged sufficient facts to conclude that under Maryland law, the plaintiff had an insurable interest in the entire property. The jury could find, based on the facts alleged in the complaint, that Erie breached the insurance contract it entered into with the plaintiff when it failed to indemnify the plaintiff after the building collapsed.

Count III: Breach of Contract
(Breach of the Implied Covenant of Good Faith)

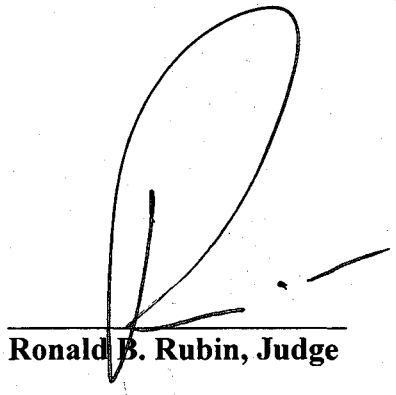
Erie contends that count III should be dismissed because since the law of the District of Columbia applies, the plaintiff cannot assert a claim under Md. Code Ann., Cts. & Jud. Proc. § 3-1701. Even if this claim were to proceed, Erie contends, it did not act in bad faith because it offered coverage to the plaintiff consistent with its contractual obligations and based upon the plaintiff's limited insurable interest. The plaintiff responds that Maryland law applies and that Erie's reliance on the District of Columbia endorsement to determine the applicable law is misplaced. The plaintiff also argues that the allegations in the complaint clearly establish a claim for failure to act in good faith.

The court has already determined that Maryland law applies. Section 3-1701 or the statutory cause of action for denial of coverage without good faith, applies "to first-party claims under property and casualty insurance policies issued, sold, or delivered in the State [of Maryland]." *See* § 3-1701(b). The statute defines good faith as "an informed judgment based on honesty and diligence supported by evidence the insurer knew or should have known at the time the insurer made a decision on a claim." *See* § 3–1701(a). Before filing an action under the statute, a party has to first exhaust administrative remedies, by first filing a complaint with the Maryland Insurance Administration, under Md. Code Ann., Ins. § 27–1001, unless an exception applies. *See* § 3-1701(c)(2)(iii).

There is no state appellate authority indicating whether there is a separate cause of action under § 3-1701. In *Whiting-Turner Contracting Co. v. Liberty Mut. Ins. Co.*, 912 F.Supp.2d 321 (D. Md. 2012), the court acknowledged the relatively recent creation of the statutory cause of action, which dates back to 2007. *See Whiting-Turner Contracting Co. v. Liberty Mut. Ins. Co.*, 912 F.Supp.2d 321, 338 (D. Md. 2012). In *Whiting-Turner*, the court explained that under Md. § 3-1701, and Md. Code Ann., Ins. § 27-1001, an insured can bring a cause of action against an insurer that failed to act in good faith when it denied coverage. *See Whiting-Turner Contracting Co.*, 912 F.Supp.2d at 338. Under these statues, the insurer can recover actual damages, up to the limits of the applicable insurance policy, along with attorneys' fees, expenses, other litigation costs, and interest. *Id.* Although this court is aware that *Whiting-Turner* is persuasive but not binding authority, it has determined that under the facts pled and the reasonable inferences that can be derived from those facts, a jury could find that Erie failed to act in good faith when it made its coverage determination.

Conclusion

For the reasons set forth above, the defendant's motion to dismiss the plaintiff's complaint is denied. It is SO ORDERED this 7th day of May, 2015.



Ronald B. Rubin, Judge